4. Kanebridge has not carried its burden of proof of fair use 42

a. The purpose and character of the use 42

b. The nature of the copyrighted work 46

c. The amount and substantiality of the portion used in relation to the copyrighted work as a whole..... 49

d. The effect of the use upon the potential market for or value of the copyrighted work..... 52

C. The Amici Attacks On Southco Are Inappropriate And Do Not Aid The Court 54

D. The Entry Of The Preliminary Injunction Was Not An Abuse of Discretion..... 57

CONCLUSION 60

CERTIFICATE OF BAR MEMBERSHIP..... 61

CERTIFICATE OF SERVICE..... 63

* * *

2. Numbers Are Copyrightable Expression

It has long been held that numbers comprise copyrightable expression. In an early decision, Judge Learned Hand explored the copyrightability of abstract symbols, code words and the like and found them all to be capable of copyrightable expression. *Reiss v. National Quotation Bureau, Inc.*, 276 F. 717 (S.D.N.Y. 1921). In 1982, this Court pioneered the recognition of copyrightability of the two digits, 1 and 0, in computer software as copyrightable expression. In *Williams Electronics, Inc. v. Artic Intern., Inc.*, 685 F.2d 870, 877 (3d Cir. 1982), the Court sustained

a final injunction restraining infringement of the copyright in a computer program, rejecting the contention that the fixation of the subject matter in the object code embodied in a computer chip could not be copyrightable. The Court found support in the legislative history of the 1976 Copyright Act to the effect that:

> [I]t makes no difference what the form, manner, or medium of fixation may be – whether it is in words, numbers, notes, sounds, pictures or any other graphic or symbolic indicia. . . .

The Court reaffirmed the *Williams* decision in *Apple Computer, Inc. v. Franklin Computer Corporation*, 714 F.2d 1240, 1249 (3d Cir. 1983), *cert. dismissed*, 104 S.Ct. 690 (1984), holding that the category of literary works under the Copyright Act is not confined to great works of literature but includes expression "not only in words but also 'numbers, or other . . . numerical symbols or indicia,' thereby expanding the common usage of 'literary works'." The Court expanded its prior holdings in *Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc.*, 797 F.2d 1222 (3d Cir. 1986).[3]

Other Courts of Appeals have reached the same result regarding the copyrightability of numbers in the same and other contexts. In *CCC Information Services v. McClean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994), the Court sustained the copyrightability of numbers in the form of used car valuations, and in *CDN Inc. v. Kapes*, 197

[3] Apparently the Government is uncomfortable with finding copyrightability in numbers but has elected not to challenge these cases. . . .

F.3d 1256 (9th Cir. 1999), the Court sustained the copyrightability of numbers in the form of price lists. The Ninth Circuit rejected the contention that the individual prices were not sufficiently original, holding them to be copyrightable because they were created and not merely found in the public domain as in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).

Tables of numbers are copyrightable even where the numbers themselves are not created or codified. *Kregos v. Associated Press*, 937 F.2d 700, 708-711 (2d Cir. 1991) (see tables, *Kregos v. Associated Press*, 731 F. Supp. 113, 122-124 (S.D.N.Y. 1990), *University of Colorado Foundation, Inc. v. American Cyanamid*, 880 F. Supp. 1387, 1401-1402 (D. Colo. 1995), *Epic Metals Corporation v. Condec, Inc.*, 867 F. Supp. 1009, 1013-1014 (M.D. Fla. 1994), *Marshall & Swift v. BS & A Software*, 871 F. Supp. 952, 959 (W.D. Mich. 1994), *Applied Innovations, Inc. v. Regents of the University of Minnesota*, 876 F.2d 626, 634-635 (8th Cir. 1989).

3. The *Toro* And *Mitel* Cases Confirm The Copyrightability Of Southco's Part Numbers

The copyrightability of numbers and part numbers for manufactured goods was addressed in *Toro Co. v. R & R Products Co.*, 787 F.2d 1208 (8th Cir. 1986). In *Toro*, the Eighth Circuit held that the parts numbers in that case were uncopyrightable because they were nothing more than arbitrary numbers assigned on a random basis with no evidence of creativity. The court defined the basis upon which part numbers would be copyrightable by rejecting the parts numbers in that case as lacking "evidence that a particular series or configuration of numbers denoted a

certain type or category of parts or that the numbers used encoded any kind of information at all." *Id.* at 1213. The court explained that a system that uses symbols in some sort of meaningful pattern, by which one could distinguish effort or content, would be an original work.[4] *Cf. Gem Products, Inc. v. Robertshaw Controls Company*, 229 U.S.P.Q. 740 (D.C. Cal. 1986) cited by Kanebridge, an example of part numbers lacking an original manner of expressing ideas or an original arrangement of facts.

Kanebridge dwells at length on the *Mitel* case but overlooks several salient facts: *Mitel* adopted and followed the *Toro* decision, which Kanebridge condemns; *Mitel* found *single-digit* numbers to be copyrightable; and in *Mitel* as in *Toro*, the numbers found to be uncopyrightable were assigned entirely arbitrarily and at random.

In *Mitel*, the court found the registers uncopyrightable because the numbers were assigned arbitrarily at random or in sequence, and in response to no system whatever. The values in *Mitel* were found to be copyrightable however, even through single digits, because they were established according to a system.

The findings of the District Court in this case, based on uncontroverted testimony, is that *every* digit in each Southco part number is assigned according to a system created by Southco.

---

[4] Surprisingly, Kanebridge devotes an entire section of its brief (III, B, 2, a) to criticizing the District Court for its reliance on *Toro*. It is surprising because Kanebridge cited the *Toro* case as authority for *its* position in its original Memorandum in Partial Opposition to the Preliminary Injunction Motion (A222).

Kanebridge wrongly argues that Southco's part numbers are no more original or less arbitrary than the registers and descriptions in *Mitel, Inc. v. Iqtel, Inc.*, 124 F.2d 1366 (10th Cir. 1997). The Southco part numbers are original on two different levels. First, a group of digits within a particular part number has a descriptive significance. Second, the sequence of the groups of numbers is original to Southco. Unlike the computer codes in *Mitel*, where the sequence of the codes was apparently dictated by the hardware the codes were required to operate, the sequence of the groups of digits in Southco's part numbers was created by Southco.

Kanebridge focuses on the individual groups of digits within the part number, trying to show that *individual digits* were either arbitrarily selected or sequentially selected, and thus not original. However, the part numbers themselves are manifestly neither arbitrary nor sequential.

Kanebridge confuses the groups of digits in Southco's part numbers with the values assigned to the *Mitel* registers. In *Mitel*, the evidence showed that values (e.g. "X27") were arbitrarily assigned to the three-digit registers. Randomly assigning a number is not a creative act. In contrast, the evidence here shows Southco created a complex system codifying descriptions with numbers.

Kanebridge admits that Southco *selected* the specific numbers to represent English units ("10"), metric units ("90"), a thread size of 632 ("2"), and a slotted screw recess ("0"), but contends, contrary to the evidence, that this selection was "arbitrary" when in fact it was a choice made by Southco in accordance with the system Southco had created.

Confusing one group of digits within the Southco part numbers with the part numbers themselves, Kanebridge wrongly concludes that "sequentially increasing Southco part numbers correspond to increasing lengths of fasteners" referencing the Southco Handbook. The correspondence which Kanebridge alleges to exist is refuted by Table II of the Handbook, A363. In that Table, the part numbers are not even arranged sequentially in the columns.

Reviewing the treatment of the single digit "values" by the *Mitel* court, Kanebridge acknowledges *Mitel's* conclusion that assignment of individual values to a wide variety of individual functions provided the minimal degree of creativity required to qualify a work as original. Kanebridge admits that *Mitel* here supports the District Court's conclusion that Southco's part numbers are original. Yet Kanebridge also opaquely argues that this was error because the values in *Mitel* were the physical and operational parameters of the telecommunications equipment being identified by the codes, and that these values are analogous to the physical specifications being identified by the part numbers. Kanebridge illogically argues that *Mitel* is irrelevant and misleadingly contends that Southco has only asserted copyright in its part numbers and not in the selection of physical specifications. That is wrong. Southco has designed its captive fasteners, *and* has creatively chosen specific groups of digits to represent the physical specifications of those fasteners, *and* has chosen specific values for those specific groups of digits, *and* has ordered those groups of digits in a particular way in its part numbers. The District Court correctly concluded that *Mitel's* treatment of the values assigned to specific functions supports the conclusion that Southco's vastly more

creatively complex part numbers meet the Copyright Act's standard of originality.

The finding of the District Court in this case, based upon the testimony at the preliminary injunction hearing, fully satisfies the requirements defined by the Eighth Circuit in the *Toro* case for the copyrightability of parts numbers.

In addition to the parts numbers themselves, the part number tables which are published in the Southco Handbooks are also copyrightable. At page C-5 of Southco Fastener Handbook No. 27 (A363) are presented six tables of Southco part numbers. In the upper table the part numbers are applied in the first column to thread number 6-32 and in the second, thread number 10-32 for flush-mounted fasteners. In the lower table, the first column is for thread number 6-32 and the second for thread number 10-32 for flare-mounted fasteners. All of the Southco part numbers in that table have been copied by Matdan, Kanebridge's manufacturer, and sixteen of the twenty part numbers appearing there, or 80%, have been copied by Kanebridge and published in its website materials to identify the Kanebridge fasteners manufactured by Matdan. (A100, A129).

4. Southco's Part Numbers Are Copyrightable As The Expressions Of An Original, Creative "System"

Kanebridge says that the District Court erred by granting protection to Southco's numbering system because "systems" are not copyrightable, citing Section

102(b) of the Copyright Act and *Baker v. Selden*, 101 U.S. 99 (1879). That argument has been rejected by this Court.[5]

In *Apple Computer, Inc. v. Franklin Computer Corp.*, 545 F. Supp. 812, 817, n.6 (E.D. Pa. 1982), the District Court held that the computer operating system programs involved were uncopyrightable as "systems" on the ground argued by Kanebridge. The Court of Appeals reversed and specifically repudiated the simplistic preclusion of copyrightability on the basis of the inclusion of "systems" in Section 102(b) of the Copyright Law. *Apple*, 714 F.2d at 1250-1251. That view was reaffirmed in *Whelan*, 797 F.2d at 1234. The same analysis has been applied in other circuits. *American Dental Association v. Delta Dental Plans Association*, 126 F.3d 977, 980-981 (7th Cir. 1997), *Toro*, 787 F.2d at 1212.

As was true of the plaintiff in the *Apple* case, Southco does not seek to copyright the idea of its parts numbering system but only its expression of it. By the same token, Kanebridge is utterly uninterested in the idea or the process of the method of Southco's part number system; Kanebridge has copied the specific expressions of that numbering system that Southco has copyrighted.

Southco's part numbers are copyrightable as the expressions of an original creative system. The codifications of information regarding Southco's products originate

---

[5] Kanebridge and the Government persist in a literal reading of *Baker v. Selden* which this Court and all thoughtful commentators have rejected. *Apple*, 714 F.2d at 1251-52; 1 Melville B. Nimmer, *Nimmer on Copyright* § 2.18[c]; *See also ABR Benefits Services, Inc. v. NCO Group*, 1999 WL 695596 (E.D. Pa.)

entirely from Southco and are selectively presented in codified form in the part numbers.[6]

5. Southco's Part Numbers Are Not "Proper Names Of Goods" Or "Titles"

The amicus briefs argue to the Court that the fact that Southco uses its part numbers to identify its products somehow precludes them from copyright protection. They seek to analogize Southco's part numbers to names and titles or words or short phrases which have been held to be insufficient as such to sustain copyrightability. But they would stand the law on its head. As the authorities upon which they rely, the names and titles in those cases were uncopyrightable, not because they were names or titles, but because that is *all* that they were.

In the seminal Supreme Court decision in *Higgins v. Keuffel*, 140 U.S. 428, 431 (1891) (Pollack Brief, p. 6) the Court carefully explained that the lack of copyrightability was the failure of the name or title to serve any other purpose:

> To be entitled to a copyright the article must have by itself some value as a composition, at least to the extent of serving some purpose other than as a mere advertisement or designation of the subject to which it is attached.

That is precisely what the Eighth Circuit did in the *Toro* case, rejecting as uncopyrightable arbitrarily assigned

---

[6] The amicus briefs, albeit unwittingly, offer a strong testimonial to the Southco's creativity. They argue that it would be burdensome to require consumers to go through all of the trouble to obtain the information codified in Southco's part numbers.

parts numbers which serve no other purpose, but recognizing the copyrightability of parts numbers encoded to provide information. *Toro*, 787 F.2d at 1213. There is no argument in the present case that the Southco part numbers do not provide substantial information, giving it "some value as a composition" so that it serves a purpose other than as a mere designation.

Both amicus briefs present their arguments that Southco's part numbers are the "names" or "titles" of the products without any acknowledgement whatever that the names of the products are, generically, "panel fasteners" and, specifically, "captive screws." (A361 ("Captive (in-the-panel) Screw Fasteners"); A367 ("Panel Fasteners"); A399 ("Retractable Captive Screws"); A405 ("Retractable Captive Panel Fasteners")).

Southco's part numbers express in codified form a substantial amount of selected information originating solely with Southco and arranged for the benefit of its customers.

6. There Is No Merger Of The Expression Of Southco's Part Numbering System And The Underlying Facts

Kanebridge contends on this appeal for the first time that the District Court erred in finding that appellee's part numbers are protectable in view of the merger doctrine. The District Court made no such finding because no such issue was raised in the District Court by Kanebridge. *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), *Continental Casualty Co. v. Dominick D'Andrea, Inc.*, 150 F.3d 245, 251 (3d Cir. 1998), *In re Unisys Savings Plan Litigation*, 74 F.3d 420, 443, n.19 (3d Cir. 1996).

The doctrine of merger applies to ideas or underlying facts which can only be expressed in one or a limited number of ways. *Apple*, 714 F.2d at 1252-1254. The Court reaffirmed *Apple* in *Educational Testing Services v. Katzman*, 793 F.2d 533, 539-540 (3d Cir. 1986). As the Court held in *Apple* and in *Educational Testing Services*, if the same idea can be expressed in a plurality of totally different manners, a plurality of copyrights may result. 714 F.2d at 1253, 793 F.2d at 539.

The underlying idea or facts with respect to Southco's part numbers are the characteristics of the individual captive screws, as the District Court explained, not the digits which make up the part numbers. (A9, A11, n.6). The system comprises the use of ten digits for nine individual elements, giving rise to a total possibility of more than one billion different numbers. The choices of individual numbers different from those selected by Southco is thus substantial. As the Eight Circuit said in the *Toro* case, there is more than one way to express a part numbering system. 787 F.2d at 1212.[7]

In the present case, the possibilities are wide open for Kanebridge to develop its own part numbering system. In fact, Kanebridge claims to have developed a part numbering system, using digits in its numbers different from Southco's to express the system. (A336). Southco does not seek to preclude Kanebridge from using its own numbering system. Kanebridge's codified numbering system is evidence itself, without more, that the underlying idea of a

---

[7] Kanebridge disagrees with the Eighth Circuit, saying that Southco's part numbers are "the only conceivable way" in which to express the idea of Southco's numbering system. No explanation is offered.

part numbering system is not restricted to the expression employed by Southco. *Cf. Toro*, 787 F.2d at 1208. There is thus no basis for application of the doctrine or merger.

* * *

Supreme Court, U.S.
FILED
AUG 31 2005
OFFICE OF THE CLERK

No. 04-1459

In The
Supreme Court of the United States

SOUTHCO, INC.,

Petitioner,

v.

KANEBRIDGE CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

SUPPLEMENTAL BRIEF WITH NEW CASE IN SUPPORT OF PETITION

JAMES C. MCCONNON
Counsel of Record for Petitioner
ALEX R. SLUZAS
PAUL & PAUL
Suite 2900
2000 Market Street
Philadelphia, PA 19103
(215) 568-4900

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

I. A NEW CASE JUSTIFIES THE DISSENT'S CONCERN THAT THE THIRD CIRCUIT DECISION IS INIMICAL TO THE STATUTORY SCHEME APPROVED BY THE SUPREME COURT IN THE *FEIST* CASE

A new case, *R&B, Inc. v. Needa Parts Manufacturing, Inc.*, 2005 U.S. Dist. LEXIS 17625 (D. Pa., Aug. 23, 2005), A1-34, justifies the concern expressed in Judge Roth's dissenting opinion (A41) that the Third Circuit decision (*Southco III*) will lead to the categorical denial of copyright protection to rule-based works without the assessment of creativity exemplified in the *Feist* opinion. The court in the *R&B* case not only held the part numbers uncopyrightable because they were rule-based but dismissed R&B's attempt to show creativity as inappropriate in view of the Third Circuit decision. A20.

Respectfully submitted,

JAMES C. MCCONNON
Counsel of Record for Petitioner
ALEX R. SLUZAS
PAUL & PAUL
Suite 2900
2000 Market Street
Philadelphia, PA 19103
(215) 568-4900

DATE: August 31, 2005

R&B, INC. v. NEEDA PARTS MANUFACTURING, INC., et al.

CIVIL ACTION NO. 01-1234

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

2005 U.S. Dist. LEXIS 17625

August 23, 2005, Decided

COUNSEL: For R&B, INC., Plaintiff: ANTHONY S. VOLPE, VOLPE & KOENIG PC, PHILADELPHIA, PA; JOHN J. O'MALLEY, VOLPE & KOENIG PC, PHILADELPHIA, PA.

For NEEDA PART MANUFACTURING, INC., JAMES KOLESZAR, Defendants: ANTHONY R. SHERR, MAYERS MENNIES & SHERR LLP, BLUE BELL, PA.

JUDGES: MARY A. McLAUGHLIN, J.

OPINION BY: MARY A. McLAUGHLIN

OPINION:

MEMORANDUM AND ORDER

McLaughlin, J.

This case involves a dispute between the largest supplier in the after-market for automotive parts, R&B, Inc. ("R&B"), and a new competitor in that market, Needa Parts Manufacturing, Inc. ("NPM"). R&B claims that NPM and its CEO, James Koleszar, infringed R&B's copyrights and trademarks.

The Court held oral argument on the defendants' motion for partial summary judgment on April 6, 2005. The Court will now grant the motion.

I. Claims and Procedural Posture

R&B's complaint, filed on March 15, 2001, makes the following claims against the defendants: (1) trademark infringement in violation of 15 U.S.C. § 1055; (2) common law trademark infringement; (3) false designation of origin in violation of 15 U.S.C. § 1125(a); (4) common law unfair competition; (5) copyright infringement in violation of 17 U.S.C. § 101, *et seq.*; (6) breach of contract; (7) breach of fiduciary duty; and (8) tortious interference with contractual relations.

The Court previously denied the plaintiff's motion for a temporary restraining order and preliminary injunction on the ground that the plaintiff failed to show a likelihood of success on the merits with respect to any of its claims. R&B appealed this Court's decision, and in an Order dated August 20, 2002, the United States Court of Appeals for the Third Circuit affirmed the denial of R&B's motion for preliminary injunction. *R&B, Inc. v. Needa Parts Mfg., Inc.*, 50 Fed. Appx. 519 (3d Cir. 2002).

The parties resumed discovery, and the plaintiff filed a motion for partial summary judgment on its NEED! trademark infringement claim. The Court denied the motion on January 30, 2004, finding that genuine issues of material fact remained on the claim.

The defendants filed a motion for partial summary judgment on March 31, 2004, but the Court held the motion in abeyance at the request of counsel while the parties engaged in settlement discussions. After counsel notified the Court that they were unable to reach a settlement, the Court scheduled oral argument on the motion for December 10, 2004. When the Court met with counsel that morning, counsel requested that the Court postpone

oral argument because they were close to reaching an agreement that would resolve the case. The Court conducted multiple telephone conferences with counsel over the next several weeks; however, settlement negotiations again broke down and counsel requested that the Court reschedule the oral argument.

The defendants move for summary judgment on four sets of claims, including: (1) the plaintiff's claims that the defendants infringed R&B's copyrights in its sales catalogs and part numbers; (2) the plaintiff's claims that the defendants infringed R&B's unregistered trademarks "MM" and part numbers; (3) the plaintiff's claims that the defendants' repackaging and resale of R&B products constitutes trademark infringement, false designation of origin, and common law unfair competition; and (4) the plaintiff's state claims for breach of contract, breach of fiduciary duty, and tortious interference with contractual relations arising from the alleged breach of a "Confidentiality and Development Agreement" that the defendant Koleszar entered into during his employment with R&B.

The defendants have not moved for summary judgment with respect to the plaintiff's claims that the defendants infringed R&B's registered trademark "NEED!" Defs'. Mem. at 20 n. 14. The plaintiff has clarified that it is not pursuing a claim that the defendants infringed the "Motormite" mark. Pl's. Mem. in Opp. at 18 n. 9.

II. Statement of Facts

The parties each introduced multiple exhibits into the record for purposes of the summary judgment motion, including the transcript of the preliminary injunction hearing that took place April 18 and 19, 2001; the deposition

testimony of Barry Myers, Robert Calvosa, Albert Baldino, and James Koleszar; the declaration of Barry Myers; a photocopy of NPM's 2001 Catalog; photocopies of R&B's 1994 and 1985 Catalogs; photocopies and samples of Motormite products in Needa? packaging; photocopies of R&B's trademark and copyright registrations; and a copy of the Confidentiality and Development Agreement that Koleszar entered into while he was employed by R&B.

The Court has reviewed all the evidence that was introduced by the parties in connection with this motion. The Court has not adopted the findings of fact that the Court made in deciding the motion for preliminary injunction unless the facts are not in dispute. Where the facts are in dispute, the Court has viewed the facts and all inferences to be drawn from the facts in the light most favorable to R&B as the nonmoving party.

The plaintiff, R&B, is a national supplier of about 35,000 automotive parts, fasteners, and service line products, as well as non-automotive fasteners. Transcript of Apr. 18, 2001 Hearing at 164 (testimony of Robert Calvosa) (hereinafter "Tr. I"). R&B's total sales are approximately $ 200 million per year. Tr. I at 179 (testimony or Robert Calvosa); Pl's. Ex. D at 19 (deposition testimony of Barry Myers).

The defendant, NPM, was formed in July of 2000 to compete with R&B in the automotive parts market. Transcript of Apr. 19, 2001 Hearing at 60-61 (testimony of James Koleszar) (hereinafter "Tr. II"). NPM currently offers about 1,000 different products and has had sales of approximately $ 18,000 since its inception in July 2000. Tr. II at 26 (testimony of James Koleszar). The defendant, Koleszar, is the Chief Executive Officer of NPM. Tr. II at

23 (testimony of James Koleszar). Koleszar was employed by R&B from approximately 1984 to 1998. Tr. II at 21 (testimony of James Koleszar). At the time of his resignation in 1998, Koleszar's title was Vice President of National Accounts. Tr. II at 21 (testimony of James Koleszar). Shortly after Koleszar started working at R&B, he executed a "Confidentiality and Development Agreement." Pl's. Ex. F.

R&B Automotive, Inc., an entity that later changed its name to R&B, registered the mark "Motormite" with the United States Patent and Trademark Office ("USPTO") in July 1983 (Registration No. 1,244,128). Pl's. Ex. A. In July 1991, R&B registered another trademark for "Motormite" with the USPTO (Registration No. 1,649,280). Pl's. Ex. A.

Of the 35,000 different items offered by R&B, about 18,000 are sold under the two "Motormite" trademarks. Tr. I at 164 (testimony of Robert Calvosa); see 1994 Motormite Buyers Guide, Defs'. Ex. 10 (hereinafter "1994 Catalog" or "R&B's Catalog"). These items are sold under various product lines or brands, such as "CLUTCH-IN!," "PEDAL-UP!," and "HELP!." See 1994 Catalog, Defs'. Ex. 10. Most of these product lines are specific to either a category of parts or to a type of repair. Tr. I at 88 (testimony of Robert Calvosa). The HELP! line consists of R&B's best selling "hard-to-find" products. Tr. I at 86-88 (testimony of Robert Calvosa). The HELP! line is further subdivided into five categories which correspond to five sections of a car – interior, exterior, underhood, undercar, and maintenance. See 1994 Catalog, Defs'. Ex. 10.

Approximately two thirds of the automotive parts that R&B supplies under the "Motormite" trademarks are sold to two types of consumers: retailers and warehouse distributors.

Pl's. Ex. D at 23 (deposition testimony of Barry Myers). Automotive retailers, such as Pep Boys and Autozone, purchase products directly from R&B and resell them to do-it-yourself members of the general public ("DIYers"). Warehouse distributors, such as Auto Value and Car Quest, purchase products directly from R&B and resell them to jobbers, which are smaller independent auto part stores. The jobbers then resell the products to professional installers who use the products in the course of providing car repair services to the general public. R&B also attempts to sell its products directly to the jobbers. The DIYers and the professional installers constitute the "end users" of R&B products. Tr. I at 203-05, 207-09 (testimony of Todd Northey).

R&B also sells products in bulk. Bulk products do not come in packages. R&B sells to different kinds of bulk customers, including repair shops, such as Midas Muffler, that use the product immediately; companies that resell the product to jobbers or installers after repackaging it; manufacturers that incorporate the parts into their own unrelated products, such as exercise bicycles; and direct competitors that may repackage the R&B product with their own products. For example, R&B may sell a wheel stud nut to a competitor which primarily sells brakes. The competitor then repackages the R&B stud nut with its own brake product and distributes the combined product to its customers. Tr. I at 200-02 (testimony of Todd Northey).

R&B has entered into agreements with some of its bulk customers that govern the way that the bulk customer may use or resell the R&B part. Tr. I at 255-56 (testimony of Todd Northey). R&B has an informal understanding with other of its bulk customers. Tr. I at 270

(testimony of Todd Northey). R&B does not have formal or informal agreements with warehouse distributors as to how its products may be sold. Tr. I at 306 (testimony of Barry Myers).

Some of R&B's Motormite products have the letters "MM" embossed or forged into them. Tr. I at 251-52 (testimony of Todd Northey). The "MM" designation has not been registered as a trademark with the USPTO. Because of the vertical configuration of the two letters, the designation sometimes appears as a thick "M." Todd Northey, R&B's vice president of field sales and a former regional sales manager, has witnessed some of R&B's customers identify the "MM" designation with Motormite. Tr. I at 235, 250-51 (testimony of Todd Northey).

Motormite products are sold through R&B's catalogs. R&B registered the following catalogs with the Copyright Office: 1985 MotorMite Catalog (Registration No. VA 196-809); Spring 1985 MotorMite Catalog Supplement 1 (Registration No. VA 193-362); Fall 1985 MotorMite Catalog Supplement 2 (Registration No. VA 208-040; 1983 Help! Catalog (Registration No. VA 195-445); and 1983 Help! Supplement Catalog (Registration No. VA 193-276). Pl's. Ex. B.

The 1994 Catalog is the current Motormite catalog and contains about 685 pages. The 1994 Catalog is organized into separate sections for each Motormite product line. 1994 Catalog, Defs'. Ex. 10.

Each Motormite product is identified in the catalog and on the product packaging by a five-digit part number. Tr. I at 103-05 (testimony of Robert Calvosa). These part numbers were independently created by R&B but have not been registered as trademarks with the USPTO.

The first two digits of each five-digit part number indicate the "family" of the product. For example, a number with the first two digits "76" belongs to the family of window handles. Tr. I at 143 (testimony of Robert Calvosa); Tr. I at 285 (testimony of Barry Myers). When the system was first developed, the first two digits were assigned in an arbitrary fashion, i.e., the number "76" has no logical relationship to window handles as compared to any other randomly selected numbers. Tr. I at 43-45, 134 (testimony of Robert Calvosa); Tr. I at 285 (testimony of Barry Myers).

The remaining three digits of each R&B part number are assigned according to a different rubric for each product family. The rubric for one product family does not necessarily apply to other product families. Tr. I at 151-52, 163 (testimony of Robert Calvosa). R&B's numbering system for any given family of products is ultimately adopted after consultation and approval from several individuals, including the new product manager and the company's executive committee. Pl's. Ex. C at 81-85, 153-54 (deposition testimony of Robert Calvosa).

R&B attempts to design a rubric for assigning numbers within each product family that corresponds with the significant characteristics of the products within that family. Tr. I at 159-63 (testimony of Robert Calvosa); Pl's. Ex. C at 45-46 (deposition testimony of Robert Calvosa). For example, within the 47000 series, the 300 range represents plastic vacuum connectors; the 400 range represents rubber vacuum connectors; and the 500 range represents nylon and vinyl vacuum connectors. Tr. I at 151-52 (testimony of Robert Calvosa).

For a handful of product families the products are numbered sequentially to reflect the relative size of the product as compared to others in the same product category. For example, snap rings are first divided into three categories – E-clips, internal snap rings, and external snap rings – and then the numbers within each category are assigned by size depending on the critical dimension of the product, i.e., E-clip numbers are assigned in size order depending on the internal diameter and internal snap ring numbers are assigned in size order depending on the outside diameter. In no case do the numbers denote the actual size of the product. Tr. I at 61-65, 148 (testimony of Robert Calvosa); Tr. I at 286 (testimony of Barry Myers).

For certain other products, the final three digits represent the size of the product packaging. For example, in the family of pedal pads, parts requiring size "A" packaging have part numbers ranging from 20700 and 20749. Tr. I at 53-59 (testimony of Robert Calvosa). Within at least one product family, the family of O-rings, the last three digits of the part number correspond to the industry standard reference number for that part. Tr. I at 143, 146 (testimony of Robert Calvosa).

Once within the appropriate range, or when there is no rubric for number assignment within a family, part numbers are assigned sequentially. Tr. I at 153 (testimony of Robert Calvosa). R&B sometimes assigns a lower number to popular products within the product family to affect how the product is merchandised, i.e, parts are usually organized in numerical order so lower-numbered products will be placed toward the front of a store display. Tr. I at 53-59, 83-84 (testimony of Robert Calvosa).

When R&B comes out with a new product or a new line of products, they first look to see if the new products should be added to an existing family. Tr. I at 45-46 (testimony of Robert Calvosa). If so, the products are assigned numbers according to the existing rubric for the family. Pl's. Ex. C at 82 (deposition testimony of Robert Calvosa).

If the new products are not added to an existing family, they are randomly assigned a two digit prefix to represent the new family. Tr. I at 46-47 (testimony of Robert Calvosa). R&B must then develop a rubric for assigning numbers within the family. Pl's. Ex. C at 80-85 (deposition testimony of Robert Calvosa).

As R&B develops a rubric for numbering products within a new family, it must decide how many numbers or blocks of numbers to reserve for future expansion within the product line. Tr. I at 46 (testimony of Robert Calvosa). R&B makes this decision after considering factors such as the product's characteristics, application, anticipated demand, and potential for future development. Tr. I at 46-48, 66-67 (testimony of Robert Calvosa). For example, where the last three numbers represent the relative size of the product, R&B may reserve numbers before, after, or in between the assigned numbers if it anticipates that smaller or larger products may be added. Tr. I at 65-67 (testimony of Robert Calvosa). Although R&B attempts to reserve enough numbers to accommodate future expansion, they have not always been successful. Tr. I at 73-80 (testimony of Robert Calvosa).

If R&B runs out of numbers for a particular product line, it will reserve a new block of numbers. Although R&B tries to reserve the new block either immediately before or after the original block within the same product family,